83-476

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ALEXANDER L. STEVAS,
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DOMINIC IAVARONE,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the failure of the trial judge to instruct the jury that "bettors" or "customers" are exempt from the prohibitions of 18 U.S.C. § 1084 was fundamental error under this Honorable Court's decision in Rewis v. United States, 401 U.S. 812 (1972); cf. United States v. Baborian, 518 F.Supp. 324 (D.R.I. 1981), and requires reversal of petitioner's conviction uinder this Honorable Court's decisions in Screws v. United States, 325 U.S. 91 (1945) and Morrissette v. United States, 342 U.S. 246 (1952).*

II. Whether this Honorable Court's decisions in Screws and Morrissette require reversal of petitioner's conviction because of the trial judge's failure to correctly define the essential elements of the term "bookmaker" in his initial charge, and, further, because of the judge's failure to instruct the jury in accordance with the definition of "bookmaker" in Devitt and Blackmar, Federal Jury Practice and Instructions, § 61.06A and the leading Circuit Court

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* This issue pertains to petitioner's convictions of Counts I and II of the indictment, charging a violation of 18 U.S.C. § 1084.

case of United States v. Box, 530 F.2d 1258 (5th Cir. 1976), notwithstanding the jury's express request for a definition of that crucial term midway in their deliberations.*

* This issue pertains to petitioner's conviction on Counts I and II of the indictment, and Count III of the indictment, charging a violation of 18 U.S.C. § 1955.

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REFERENCE TO THE REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The Memorandum Order of October 12, 1982 by Honorable Daniel H. Huyett, III, District Court Judge sitting in the Eastern District of Pennsylvania, denying the post-trial motions of this petitioner is appended to this petition. That memorandum was not reported.

Similarly, the Judgment Order of the Third Circuit Court of Appeals affirming the judgment of conviction and sentence in this case and filed in that court on July 26, 1983 was not reported but is appended hereto.

CONCISE STATEMENT OF THE GROUNDS UPON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

Jurisdiction of the United States Supreme Court is invoked to review the Judgment Order in the Third Circuit Court of Appeals filed July 26, 1983 affirming the judgment of conviction and sentence of this petitioner entered in the United States District Court for the Eastern District of Pennsylvania on November 8, 1982.

The Supreme Court's jurisdiction to review this matter rests upon the provisions of 28 U.S.C.A. § 1254 which reads in pertinent part as follows:

> **§ 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, ORDINANCES AND REGULATIONS INVOLVED

In addition to the Fifth Amendment to the United States Constitution, this Petition involves and refers to §§ 2, 371, 1084, 1952 and 1955 of Title 18 of the United States Code, all of which sections are reproduced and attached hereto in the Appendix to the Petition.

CONCISE STATEMENT OF THE CASE

This Petition for Writ of Certiorari involves an issue of first impression for this Honorable Court, interpretation of the federal Government's anti-gambling satutes, 18 U.S.C. § 1084, and 18 U.S.C. § 1955, in order to delineate the distinction between bookmakers within the purview of the act and bettors or customers whose conduct is not so proscribed.

Petitioner, Dominic Iavarone, was charged, along with co-defendant, David Battisti, in Count I of an indictment alleging violation of 18 U.S.C. §§ 1084 and 371; in Count II of the indictment, violation of 18 U.S.C. §§ 1084 and 2; and in Count III of the indictment, violation of 18 U.S.C. §§ 1952(a)(3), 2, and 1955.

After a trial by jury, petitioner was convicted of all three counts of the indictment.

Petitioner was sentenced as follows:

COUNT I - Five years incarceration plus a fine of $5,000.00;

COUNT II - Two years incarceration, to be served concurrently with the sentence imposed as to Count I;

COUNT III - Five years probation to run consecutively to the sentence imposed.

The critical and essential thrust of the defense theory in the case at bar was that the defendants were mere bettors or customers of bookmakers, and that the activities of the defendants did not constitute "bookmaking" because they did not make a profit from a percentage or commission collected from other bettors or customers for the privilege of placing bets with them.

The testimony of the Government's star witness at trial, Thomas DiNola, and of petitioner's co-defendant, David Battisti, unequivocally established an evidentiary foundation upon which the jury, if correctly instructed, would have acquitted the defendants by concluding that they were bettors or by concluding that they were not bookmakers. DiNola and Battisti confirmed that petitioner never relied on a percentage of wagers for his income, as a bookmaker would, but rather depended upon winning bets for any return on his investment.[1/]

The trial judge refused to instruct the jury that the term "being engaged in the business of betting or wagering" for purposes of 18 U.S.C. §1084(a)

1/ See Court of Appeals Appendix at pp. 242a, 252a, 318a, 319a, 321a, 327a, 330a, 334a, 352a, 354a, 388a, 274a, 279a, 350a-351a, 354a, 380a, 332a, 252a, 623a, 624a, 648a, 650a, 668a, 671a-672a, 675a, 663a, 678a.

did not include within its scope of prohibited activities the conduct of "bettors" or "customers" of bookmakers.

The trial judge, with regard to Counts I and II charging 18 U.S.C.A. § 1084 violations, specifically refused to instruct the jury, as requested by the defense on the definition of "bookmaking" provided in Federal Jury Practice and Instructions, Devitt and Blackmar, § 61.06A. Nor did the instructions given to the jury by the trial judge, as to 18 U.S.C. § 1084, give any guidance with respect to the essential elements which define "bookmaking", i.e., accepting bets from customers on either side of the wagering proposition with a view toward making a profit from a commission collected for the privilege of placing bets. Such a written instruction was requested by the defense (see Appendix p. A-13 to A-19, infra.)

The trial judge, as to 18 U.S.C. § 1955, Count III, similarly refused to instruct the jury, as requested by the defense, on the definition of "bookmaking" provided in Federal Jury Practice and Instructions, § 61.06A. Nor did the instructions given by the trial judge, as to 18 U.S.C. § 1955, give any guidance to the jury with respect to the essential element which distinguishes "bookmaking", and which places it within the purview of federal criminal statutes.

The record establishes beyond cavil that the jury was confused both as to the trial judge's failure to instruct that bettors were not within the scope of prohibited activities under 18 U.S.C. § 1084, and

because of the trial judge's failure to instruct on the critical element which distinguishes "bookmakers" from "customers" or "bettors" within the meaning of 18 U.S.C. §§ 1084 and 1955, i.e., that bookmakers accept bets with a view toward making a commission for the privilege of placing the bets.

After having deliberated for some time, the jury sent a note to the trial judge, stating as follows:

> "May we please have the definition of a bookmaker and bettor". [See Appendix, infra. at p. A-20].

At a conference between the trial judge, the prosecutor and defense counsel as to what instructions the trial judge would give in response to the jury's question, the defense specifically requested, that as to the definition of "bookmaker", as distinguished from "bettor", the jury be given the instruction previously requested and denied, contained in Federal Jury Practice and Instructions, Devitt and Blackmar, § 61.06A, as follows:

> 'Bookmaking' is a form of gambling, and involves the business of establishing certain terms and conditions applicable to given bets or wagers, usually called a line or odds, and then accepting bets from customers on either side of the wagering proposition with a view toward making a profit not from the betting itself, but from a percentage or commission collected

> collected from the bettors or customers for the privilege of placing the bets. ...
> [Emphasis added]

The trial judge refused to give the requested instruction. Nor did he, in giving his response to the jury's question, instruct the panel that bettors were exempt from the prohibitions of 18 U.S.C. § 1084.

The trial judge merely reiterated an instruction given in the initial charge to the jury. That erroneous instruction appears in the Appendix to this Petition at page A-30, et. seq.

The trial judge's failure to specifically instruct the jury in accordance with the Devitt and Blackmar point and his failure to instruct the jury that mere bettors were not within the scope of prohibited activities under 18 U.S.C. § 1084, had the practical effect of a tidal wave washing away the entire defense theory of the case, a theory which, as the jurors' mid-deliberation inquiry reveals, was apparently adopted by the factfinder.

The jury convicted both the petitioner, Dominic Iavarone, and his co-defendant, David Battisti, of all Counts, violations of both 18 U.S.C. §§ 1084 and 18 U.S.C. § 1955.

Petitioner filed timely motions for judgment of acquittal (i.e., arrest of judgment), and for a new trial. In those motions, petitioner expressly raised the issues which he raises herein. The trial court denied post-verdict relief.

Petitioner filed a timely appeal of his conviction to the United States Court of Appeals for the Third Circuit, which Court affirmed the judgment of conviction and sentence of the District Court, without discussion of the issues. (See Appendix, infra. at pp. A-1 to A-3).

REASONS FOR GRANTING THE WRIT

ISSUE I: THE REFUSAL OF THE TRIAL JUDGE TO INSTRUCT THE JURY THAT "BETTORS" OR "CUSTOMERS" ARE EXEMPT FROM THE PROHIBITIONS OF 18 U.S.C. § 1084 IS CONTRARY TO ALL OF THE REASONING SUPPORTING THIS HONORABLE COURT'S DECISION IN REWIS V. UNITED STATES, 401 U.S. 812 (1972) AS WELL AS THE CONSENSUS OF OPINIONS BY OTHER FEDERAL COURTS AND THE FINDINGS OF LEARNED COMMISSIONS APPLYING REWIS TO ANALOGOUS FEDERAL GAMBLING STATUTES.

This Honorable Court, in the case of Rewis v. United States, 401 U.S. 812 (1972) held that the Federal Travel Act, 18 U.S.C.A. § 1952, could not be applied to "mere customers" of a gambling establishment. The Rewis Opinion observed that placing a bet was legal in some jurisdictions and a petty offense in others. Consequently, this Court concluded that such insignificant law-breaking should not rise to the level of a federal criminal offense merely because the bettor utilized interstate travel to place his wager, since such a result "would alter sensitive federal-state relationship, [and] could overextend limited federal police resources, ..."

Obviously, the reasoning in the Rewis case applies equally to 18 U.S.C. § 1084 where, one must assume, Congress did not desire that the petty offenses

of bettors and gambling customers become the subject of federal criminal law enforcement merely because interstate telecommunication was utilized. In fact, the Court of Appeals for the Fifth Circuit has extended the reasoning in Rewis to 18 U.S.C. § 1955 and declared that customers and bettors are exempt from the definition of a proscribed gambling enterprise contained in that statutory section, see United States v. Box, 530 F.2d 1258 (5th Cir. 1976).

Learned commentators and institutional investigators have provided additional support for the proposition that the conduct of bettors and customers of gambling businesses falls outside the scope of § 1084. For example, the Hearings before the Subcommittee on Criminal Law and Procedure of the Senate Committee on the Judiciary, 92nd Congress, First Session, February 10, 1971 at part I as well as the Report of the National Commission on Reform of Federal Criminal Laws, Comment to Proposed 18 U.S.C. § 1831 (at page 413) both declare that bettors and customers are exempt from the purview of federal gambling prosecution. Similarly, the Commission on Review of National Policy Toward Gambling, 38 F.B.J. 69, 71 (1979), reaches the same conclusion.

Despite the sound reasoning enunciated in the Rewis Opinion as well as the decisions and articles that have subscribed to it, no authority exists in the Circuit Courts of Appeals to formally support the proposition that factfinders reviewing § 1084

prosecutions be advised that the conduct of bettors and customers falls outside the offense defined in the statute. The Opinion in the First Circuit Court of Appeals in United States v. Southard, 700 F.2d 1 (1983), while approving an instruction exempting bettors from 1084 prosecution, fell short of deciding this issue conclusively, id., pp. 20-22.

The only decision to expressly exempt bettors from § 1084 is a ruling in the District Court for the District of Rhode Island, United States v. Barborian, 528 F.Supp. 324 (1981). There, Chief Judge Pettine concluded that Congress did not intend for the definition of "being engaged in the business of betting or wagering... ." in § 1084 to include bettors, regardless of how sophisticated or substantial the betting enterprise is, 528 F.Supp. at 328, 329. In fact, Judge Pettine exempted bettors from § 1084 by application of the same reasoning used by this Honorable Court in Rewis, i.e., the danger of inadvertently expanding federal criminal jurisdiction and the necessity for strict construction of criminal statutes:

> In short, § 1084 does not sweep within its prohibition a mere bettor. Congress never intended that the federal government should thus invade the criminal jurisdiction that properly belongs to the states. I adopt defense counsels' argument that the interpretation of § 1084 preferred by the government would upset this balance between state and federal law enforcement

> functions by drastically expanding federal criminal jurisdiction. Section 1084(a) by reaching the customer of the business would become an anomaly in the federal matrix, intruding into an area that the individual states are perfectly able to fill. As a general rule, criminal statutes must be narrowly construed. Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955); United Sttes v. Box, 530 F.2d 1258, 1266 (5th Cir. 1976); United States v. Bergland, 209 F.Supp. 547 (D. Wis. 1962), rev'd on other grounds, 318 F.2d 158, 159 (7th Cir.), cert. den., sub nom. Cantrell v. United States, 375 U.S. 861, 84 S.Ct. 129, 11 L.Ed.2d 88 (1963). This general rule applies with particular force where a broad construction would serve to push federal criminal jurisdiction into areas previously reserved to the states. [528 F.Supp. at 331].

Where, as here, the refusal of the trial court to instruct the jury that bettors were exempt from the application of § 1084 effectively denied the petitioner the right to a factfinder properly informed of the elements of the offense charged, it is respectfully submitted that this Honorable Court's previous decisions including Morrissette v. United States, 342 U.S. 246 (1952), mandate a reversal of the conviction. In fact, the instruction exempting bettors was submitted to the trial court prior to the jury charge

(see Appendix, infra. at pp. A-13 to A-14), and the Court rejected that proposed instruction at the pre-charge conference (Appendix, infra., pp. A-15 to A-19). Remarkably, the Court rejected the petitioner's proffered instruction on this point a second time when the jury emerged from its deliberations to request clarification of the distinction between "bettor" and "bookmaker". (Appendix, infra. at p. A-20, et. seq.)

REASONS FOR GRANTING THE WRIT

ISSUE II. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURORS ON THE DISTINCTION BETWEEN BETTORS AND BOOKMAKERS VIOLATED THIS HONORABLE COURT'S RULINGS REQUIRING THAT THE FACTFINDER BE INFORMED OF ANY ESSENTIAL ELEMENT OF THE OFFENSE CHARGED AS WELL AS DEFENSE THEORIES OF THE CASE; FAILURE TO ANSWER THE JURY'S EXPRESS REQUEST FOR ASSISTANCE WITH DISTINGUISHING BETTOR AND BOOKMAKER MIDWAY IN THE DELIBERATIONS FURTHER DENIED THE PETITIONER HIS RIGHT TO A FAIR TRIAL AS ENUNCIATED IN SCREWS V. UNITED STATES, 325 U.S. 91 (1945), MORRISSETTE V. UNITED STATES, 342 U.S. 246 (1952) AND BOLLENBACH V. UNITED STATES, 326 U.S. 607 (1946).

The terms "bookmaking" or "bookmaker" are words of art which define the business of betting or wagering, conduct of which is proscribed by § 1955 and facilitation of which through the use of interstate transportation or communication facilities is prohibited by §§ 1952 and 1084 of Title 18 respectively. For this reason, the various Circuit Courts of Appeals, in reviewing prosecutions brought under the sundry federal gambling statutes, have approved the use of expert testimony to aid the jury in understanding gambling terms generally and the crucial bookmaker and bettor distinction in particular. See United States v. Scavo, 593 F.2d 837

(8th Cir. 1979); United States v. McCoy, 539 F.2d 1050 (5th Cir. 1976), cert. den. 431 U.S. 919 (1977); United States v. Morrison, 531 F.2d 1089 (1st Cir. 1975), cert. den. 429 U.S. 842 (1976); United States v. Milton, 555 F.2d 1198 (5th Cir. 1977); United States v. Alfonso, 552 F.2d 605 (5th Cir. 1976), cert. den., 434 U.S. 857 (1977).

In fact, the distinction between bettor and bookmaker was the foundation of the theory of petitioner's defense at trial. Petitioner's counsel argued to the factfinder that the uncontradicted evidence of prosecution and defense witnesses alike revealed that the petitioner's wagering was profitable only when his bets were winners and that he arrogated no income to himself from the mere act of placing his own or other people's bets.

Reasoned opinions such as that of United States v. Box, 530 F.2d 1258 (5th Cir. 1976) support just such a distinction between bettors and bookmakers. As the Court in Box stated at 530 F.2d, 1260-1262:

> THE NATURE OF A BOOKMAKING OPERATION
>
> This section might be subtitled, 'How to Succeed in Gambling Without Really Gambling', because a successful bookmaker makes his profit not from winning bets, but rather from collecting a certain percentage of the amount bet that the losers are required to pay for the privilege of betting. This percentage,

> 10% in the Shreveport area, is called 'juice' or 'viggerish', and its effect is to require a bettor to risk $110.00 in an attempt to win $100.00. ...
> [Emphasis added]

The petitioner respectfully submits that the Opinion of this Court in Rewis stands for the proposition that a mere bettor falls outside the definition of "any business enterprise involving gambling" in § 1952(b)(1), "an illegal gambling business" in § 1955(a) and, "the business of betting or wagering" as defined in § 1084(a) of Title 18 of the United States Code. In order for the jury to be able to apply this directive from Rewis to the facts in the petitioner's case, it was necessary that the jurors be informed of the distinction between bettors and bookmakers. Failure to explain that distinction denied the jurors an adequate definition of the crucial operative element of each of the above statutory sections. This Honorable Court has declared that, whether requested or not, the jury is entitled to a charge explaining each and every essential element of the offenses listed in the indictments, Screws v. United States, 325 U.S. 91 (1945), Morrissette v. United States, 342 U.S. 246 (1952) and United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395 (1947).

It is respectfully submitted that the petitioner was further entitled to instructions explaining

to the jury the nature of the defense theory of the case. In United States v. Wright, 593 F.2d 105 (9th Cir. 1979), it was held that defendants are entitled to an explanation of their theory. The Fifth Circuit Court of Appeals in United States v. Lewis, 592 F.2d 1282 (1979) declared it reversible error to refuse to charge on a defense theory where, if the theory were believed by the factfinder, it would result in a verdict of not guilty. See also, United States v. Young, 464 F.2d 160 (5th Cir. 1972).

Finally, petitioner submits that denial of the instruction quoted from Devitt and Blackmar § 61.06A, when the jurors returned from deliberation to request just such a definition of the difference between a bookmaker and bettor was both a denial of the petitioner's right to a fair trial and an index of the magnitude of the prejudice resulting from failure to delineate the bookmaker and bettor distinction from the outset. Decisions of this Court such as Bollenbach v. United States, 326 U.S. 607 (1946) as well as other federal authority such as United States v. SanFilippo, 581 F.2d 1152 (5th Cir. 1978) stand for the proposition that the jury is entitled to careful, clear and thorough answers to questions which they report during the course of their deliberations. Refusal to provide those answers surely constitutes reversible error. In the case at bar, it is clear that the question which the jury considered so paramount as to warrant interrupting deliberations, namely

the distinction between bookmaker and bettor, was the very same issue upon which the petitioner based the theory of his defense and upon which petitioner's counsel argued most strenuously, though unsuccessfully, for appropriate jury instructions.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT F. SIMONE
Attorney for Petitioner

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PER CIRCUIT JUDGE ARLEN M. ADAMS DATED JULY 26, 1983 AFFIRMING JUDGMENT OF CONVICTION IN THE DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 82-1739

UNITED STATES OF AMERICA

V.

DOMINIC IAVARONE
a/k/a Lulu

Dominic Iavarone,

Appellant

On Appeal from the United States
District Court for the Eastern
District of Pennsylvania
(Crim. No. 82-00140-01)
(Honorable Daniel H. Huyett, 3rd)

Argued July 19, 1983

Before: ADAMS and HIGGINBOTHAM,
Circuit Judges, and
TEITELBAUM, District Judge*

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* Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After considering all contentions raised by appellant, namely, that (I) the evidence is insufficient, as a matter of law, to establish beyond a reasonable doubt that appellant was guilty of Count I of the indictment, violation of 18 U.S.C. §§ 1084 and 371; of Count II of the indictment, violation of 18 U.S.C. §§ 1084 and 2; and of Count III of the indictment, violation of 18 U.S.C. §§ 1952(a)(3), 2 and 1955; (II) the charges must be dismissed because the Government charged a single conspiracy in Count I and proved instead two separate conspiracies, which constitutes a fatal variance under the principles ennunciated in Kotteakos v. United States, 328 U.S. 750 (1945); (III) the trial court committed substantial, fundamental, and prejudicial error by (a) failing to give proper instructions defining and stating the elements of each of the offenses charged, Counts I, II, and III of the indictment; and (b) failing to give supplemental instructions requested by the jury, thereby leaving the jury confused and misled; (IV) the appellant IAVARONE was prejudiced by the failure of the trial court to grant relief on the issues raised by co-appellant BATTISTI, which are hereby incorporated by reference; and (V) appellant IAVARONE

was prejudiced by the failure of the trial court to grant the requested relief raised by appellant in his post-trial motions, which are hereby incorporated by reference, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT:

_____
Circuit Judge

ATTEST:

_____
Sally Mrovs, Clerk

DATED: July 26, 1983

MEMORANDUM ORDER OF OCTOBER 12, 1982 BY HONORABLE DANIEL H. HUYETT, III DENYING PETITIONER'S POST-TRIAL MOTIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION

V. :NO. 82-140-2

DAVID BATTISTI :

ORDER

NOW, October , 1982, upon consideration of the defendant's omnibus post-trial motions, memoranda submitted by the parties, and because:

1. With respect to paragraph 1 of the defendant's motion alleging error in the court's charge, I conclude that this contention is without merit for the reasons stated in the government's memorandum.

2. With respect to paragraph 2 of the defendant's motion alleging insufficient evidence to convict the defendant, I conclude that the evidence was sufficient to support a conviction. The verdict was not against the weight of the evidence. Specifically, I adopt and incorporate the position of the government on this matter as stated in the government's memorandum at II.

3. With respect to paragraph 3 alleging prejudice to the defendant as a result of permitting the

the government to impeach defendant Battisti by introducing his prior criminal conviction, I have concluded that the evidence was properly admissible pursuant to Fed.R.Evid. 609 (a)(1) and that its probative value clearly outweighed its prejudicial effect. I, therefore, adhere to my previous conclusion, see Notes of Testimony (N.T.) at 487-490, and adopt and incorporate the position of the government on this issue as stated in the government's memorandum at III.

4. With respect to paragraph 4 of the defendant's motion challenging denial of defendant's pretrial motion to suppress evidence and challenging denial of an evidentiary hearing, I have reviewed the transcript and adhere to my previous ruling, see Transcript of Hearing on Pending Motions (T.H.) at 26-28.

5. With respect to paragraph 5 alleging abuse of discretion in the court's denial, without further inquiry, of the defendant's motion to dismiss the indictment, I have considered the authorities cited by the defendant and conclude that they do not support dismissal of the indictment. I further adopt my previous ruling, see N.T. at 584-587, and find that there are no appropriate grounds for inspection of grand jury notes at this time, and that there were no grounds for inspection of grand jury notes at this time, and that there were no grounds for inspection at the time the motion was raised during the trial.

6. With respect to paragraph 6 alleging that it was error to refuse to permit the defendant's exculpatory statement to be introduced into evidence, I adhere to my earlier ruling, see N.T. at 558-564.

7. With respect to paragraph 7 alleging that the admission of remarks by co-defendant Iavarone to the effect that the gambling activities were illegal constituted error, I conclude that this contention is without merit for the reasons stated in the government's memorandum.

8. With respect to paragraph 8 alleging that the province of the jury was violated by portions of the government's closing argument, I have reviewed the government's closing speech and, in the absence of any specific guidance from the defendant, and in light of the fact that no objection was made by defense counsel at the time of the closing argument, I find no error.

ACCORDINGLY, IT IS ORDERED that the motions are DENIED.

/s/
DANIEL H. HUYETT, 3rd,
Judge

PERTINENT EXCERPTS FROM 18 U.S.C. §§ 2, 1084, 1952 AND 1955

TITLE 18 U.S.C. § 2

§2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.
(June 25, 1948, ch 645, § 1, 62 Stat. 684; Oct. 31, 1951, ch 655, § 17b, 65 Stat. 717).

TITLE 18 U.S.C. § 1084

§ 1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both....

TITLE 18 U.S.C. § 1952

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act [21 U.S.C.S. § 802(b)], or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.
(Added Sept. 13, 1961, P.L. 87-228, § 1(a), 75 Stat. 498; July 7, 1965, P.L. 89-68, 79 Stat. 212; Oct. 27, 1970, P.L. 91-513, Title II, Part G, § 701(i)(2), 84 Stat. 1282.)

TITLE 18 U.S.C. § 1955

§ 1955. Prohibition of illegal gambling businesses
(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section--

(1) "illegal gambling business" means a gambling business which--

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot

machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established....

TITLE 18 PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED, SECTION 5514

§ 5514. Pool Selling and Bookmaking

A person is guilty of a misdemeanor of the first degree if he:

(1) engages in pool selling or bookmaking;

(2) occupies any place for the purpose of receiving, recording or registering bets or wagers, or of selling pools;

(3) receives, records, registers, forwards, or purports or pretends to forward, to another, any bet or wager upon the result of any political nomination, appointment or election, or upon any contest of any nature;

(4) becomes the custodian or depository, for gain or ward, of any property staked, wagered or pledged, or to be staked, wagered, or pledged upon any such result; or

(5) being the owner, lessee, or occupant of any premises, knowingly permits or suffers the same, to be used or occupied for any of such purposes.

1972, Dec. 6, P.L.__, No. 334, § 1, eff. June 6, 1973.

EXCERPT FROM DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, SECTION 61.06A

§ 61.06 "Bookmaking"--Explained

"Bookmaking" is a form of gambling, and involves the business of establishing certain terms and conditions applicable to given bets or wagers, usually called a line or odds, and then accepting bets from customers on either side of the wagering proposition with a view toward making a profit not from betting itself, but from a percentage or commission collected from the bettors or customers for the privilege of placing the bets.

You are instructed that "bookmaking" is unlawful in the state of _____.

EXCERPTS FROM POINTS FOR CHARGE REGARDING DEFINITION OF "BETTOR" AND "BOOKMAKER" SUBMITTED BY PETITIONER AT TRIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL NO.

VS. : 82-00140-2

DAVID BATTISTI :

ADDITIONAL REQUESTED POINTS FOR CHARGE FOR DAVID BATTISTI (I)

Pursuant to Fed.R.Crim.Pro. 30, David Battisti, by his attorney, NICHOLAS J. NASTASI, submits further points for charge in light of the evidence produced by the Government during trial:

1. Define "business of betting or wagering", 18 U.S.C. § 1084, as follows: Section 1084 deals with bookmakers - a person "engaged in the business of betting or wagering." Bookies take bets, they receive them, they handle them. "Bookmaking" is a form of gambling; it involves the business of establishing certain terms and conditions applicable to given bets or wagers, usually called a line or odds, and then accepting bets for customers who are on either side of the wager proposition with a view toward making a profit not from betting itself, but from a percentage or commission collected from the bettor or customers for the privilege of placing

the bets. If you conclude from the evidence, that David Battisti was in the business of betting where a profit was made, if and only if a bet was won, you must find him not guilty of all the charges. See, United States v. Tomeo, 459 F.2d 445 (10th Cir. 1972); Devitt & Blackmar, Section 61.06A.

2. Instruct the jury that the "unlawful activity" prohibited by 18 U.S.C. § 1952(a)(3), is the "business of gambling", that is, bookmaking. "Unlawful activity" does not include wagering where a profit is made only if the bet is won.

3. Instruct the jury that Mr. Battisti was not in "business of gambling" by placing bets for himself or for or where a profit could be made only if the bet was won and that such gambling is not a violation of 18 U.S.C. §§ 1084 and 1955. ...

EXCERPTS FROM TRIAL TRANSCRIPT RELATING TO THE DENIAL OF DEFENSE PROFFERED INSTRUCTION DISTINGUISHING "BOOKMAKER" FROM "BETTOR" AND EXPLAINING THAT "UNLAWFUL ACTIVITY" DOES NOT INCLUDE THE CONDUCT OF BETTOR

(N.T. 601 TO 605; THIRD CIRCUIT COURT OF APPEALS APPENDIX PAGES 724A TO 728A)

Now, we have some additional points handed to me just before this charge conference, which I really have not had a chance to study.

Has the Government had a chance to look at these?

MR. CLARK: They were --

THE COURT: They arrived in my chambers at five o'clock. I left about five minutes before they arrived, so I didn't see them until my arival this morning. They are in two groups, Roman I and Roman II. Have you had a chance to look at these, Mr. Clark?

MR. CLARK: Yes, we got them also, last night.

THE COURT: Any comment on No. 1, which starts off with "Define" 'business of betting or wagering'."

MR. CLARK: We would object to it. Your instructions already covered what a bookmaker is in the Government instructions.

THE COURT: I will deny No. 1 and say that nearly all of the terms I intend to define. I don't want to be tied down to using this precise language, some of which I don't quite agree with. Some of it is language from cases which may not be appropriate. I believe I will cover all of the pertinent concepts raised in No. 1 adequately.

If I don't, counsel may make an objection at the conclusion of my charge.

MR. NASTASI: May I respond briefly, Your Honor?

THE COURT: Yes.

MR. NASTASI: Your Honor has already approved a portion of this and by denying it here, you don't intend to reverse what you did earlier? The Government has language in one of its points which says that bookies take bets, they receive them, they handle them. That sentence appears as the second sentence in point No. 1. You are going to state that?

THE COURT: Yes, I am denying this only so that I am not tied down to any of the language, some of which I don't think is appropriate. I don't have time to edit Roman I, so I am denying it, and I am telling you that any concepts that I think are proper, I will include. If I do not, you can object later.

MR. NASTASI: Yes, Your Honor.

THE COURT: What about Roman numeral II, Mr. Clark?

Is unlawful activity in the case?

MR. CLARK: Yes, sir, under 1955, but I don't believe -- I believe this is too restrictive a definition that the business of gambling is always bookmaking, because it is the Government's understanding that 1952 would make reference to 1955, and 1955 in turn, would make reference to the Pennsylvania statute which goes which is much broader than bookmaking. So the Government feels this is an unduly restrictive definition and objects to it.

MR. NASTASI: May I respond briefly?

THE COURT: Yes.

MR. NASTASI: I am sure this was a misstatement by Mr. Clark. We are speaking of the third count which charges 1952 and incorporates as a predicate Section 1955. In Section 1955, it incorporates language namely, "unlawful activity." Section 1955 speaks of unlawful activity in terms of being the business of gambling. Devitt and Blackmar has a recommended charge at 61.06(a), which sets forth in detail the concept I have set forth in Point 2.

Our position is that it is vital to the defense, because it represents the law that unlawful activity

does not include wagering. Both federal law and Pensylvania law. The section of Pennsylvania law that is relied on as a predicate by the Government has language which has already been quoted, that the accepting or receiving of a bet and forwarding or pretending to forward a bet is unlawful activity in Pennsylvania.

However, it is not unlawful if that activity is performed by a bettor. A bettor can forward a bet to a bookmaker and an agent may not forward a bet to a bookmaker. That is what the law of Pennsylvania clearly is and that is what federal law clearly is, and unless the jury is told that, the jury will be misled, that a bettor who forwards a bet can violate the law, because a bettor who forwards a bet cannot violate either federal or Pennsylvania law.

THE COURT: Any other comments, Mr. Clark?

MR. CLARK: Only, Your Honor, we think that if this were given as it is, it is entirely too restrictive and that the business of gambling, the way this reads here, can only mean bookmaking and that is clearly not the case.

MR. SIMONE: What else do we have in this case, factually?

MR. CLARK: Betting and wagering.

THE COURT: Gentlemen, I will deny Roman numeral II. I agree with the Government. It is

too restrictive. I will cover this in an appropriate manner in my charge in respect to Count 3.

NOTES OF TESTIMONY FROM TRIAL RECORDING THE RECEIPT OF DISCUSSION UPON, AND RESPONSE TO A NOTE FROM THE JURY DURING DELIBERATIONS REQUESTING THE DEFINITION OF "BETTOR" AND "BOOKMAKER"
(N.T. 6-5 TO 6-17; THIRD CIRCUIT APPENDIX PAGES 796A TO 808A)

The following transpired in open court outside the presence and hearing of the jury:)

THE COURT: Gentlemen, we have another note from the jury. This one reads as follows:

"May we please have the definition of a bookmaker and a bettor?"

And it is signed by Stephanie Ray, Foreperson of the jury.

I have marked this as Court Exhibit No. 2, dated it today, and initialed it.

(So marked as Court Exhibit 2 in evidence.)

THE COURT: What comment -- what does the Government suggest?

MR. CLARK: The Government believes Your Honor should repeat the instruction which you already gave which was Government Request 24C, as well as -- I'm sorry, that is what our position is, that that same point ought to be given again.

THE COURT: 24C?

MR. CLARK: That's correct, sir. That is the instruction which Your Honor already gave and we ask that it be repeated.

MR. SIMONE: Your Honor --

THE COURT: Just a moment, let me get 24C.

MR. SIMONE: Yes.

THE COURT: All right.

MR. NASTASI: May I respond to that, Your Honor?

THE COURT: Yes.

MR. NASTASI: Your Honor, 24C is addressed to the definition of being engaged in the business of betting or wagering. The language quoted by the Government, excluding that first sentence, the first sentence says the following:

"A bookmaker is but just one example of a person engaged in the business of bettingg or wagering".

That language is taken from Section 1084. The language that follows, this sentence:

"Bookmakers take bets, they receive them and they handle or service these bets --"

THE COURT: What are you reading from?

MR. NASTASI: 24C, Your Honor.

What I am explaining, Your Honor, is the first sentence applies to Section 1084. The second sentence defines bookmakers. The jury's question is not presented in terms of being under Section 1084. The jury's question could apply to any of the charges. It would be inappropriate for us to

inquire as to how it arises. So that what we should define is only what they are requesting information about.

THE COURT: What do you suggest?

MR. NASTASI: Devitt and Blackmar has a definition of bookmaking. It is specifically designed and exclusively designed to cover that one term. It is the only section in Devitt and Blackmar that defines bookmaking.

THE COURT: Just a moment.

Continue, Mr. Nastasi.

MR. NASTASI: Devitt and Blackmar, Section 61.06(a), which I have here, which I have requested and the Court -- I would request the Court to look at it. May I hand it up, rather than read it?

THE COURT: I have it here.

MR. NASTASI: I'm sorry. I need not read it then.

I have referred to it by section, but it is exclusively designed to answer the inquiry made by the jury, because the jury wants the definition of "bookmaker". They have not asked for the definition of engaging in the business of betting and wagering, of which one example is bookmaker. So that 24C is not at all designed to appropriately answer the question.

Furthermore, 24C is language from a Tenth Circuit decision and it comes under a case that

arises under 1084. The jury's question isn't that limited. So that 61.06(a), I believe, answers that.

In addition, I believe that the definition of "bettor" would be covered by this, since it speaks in terms of what a bettor or wagerer is. "Customers for the privilege of placing bets," the concluding language. So I think this one sentence is ideally suited to answer the two prongs of the question that the jury has requested an answer to.

THE COURT: Of course, I did say in the charge, "A mere bettor or customer of a gambling business may not properly be said to conduct the business".

I think that is the only reference I can recall to "bettor" in the charge.

MR. NASTASI: My recollection coincides precisely with the Court's.

THE COURT: All right. Mr. Simone, what do you suggest we do?

MR. SIMONE: I suggest that the question could be answered head on and directly, and as I read 61.06(a), that answers what "bookmaking" is and the statement Your Honor made about what a bettor is, I believe the two items should be chaarged to the jury and I don't think we should get into gambling, gambling house or anything like that. They have not asked for that.

THE COURT: any other comment, Mr. Clark?

MR. CLARK: Yes. The defense had the

opportunity to ask for a definition of bookmaker at the charging conference and the Court elected to use the definition "bookmaker", which is Government Exhibit 24C, and as the Government sees it, they are trying to rehash what they did before.

The Court has approved the definition. This is a 1084 case; two of the counts reflect that. And we request 24C should be repeated. That is what they are looking for. They are looking for a repetition of the definition they ahve already received and to confuse the jury by giving new definitions and different from what they have already had.

THE COURT: Mr. Nastasi?

MR. NASTASI: Just briefly, rebuttal, Your Honor.

I remember being appropriately criticized by the Court and I take blame for it, in that I didn't request this section. I requested something other than this section. So that this is not the section that was read by the Court in contradistinction of my request, because the Court excluded my remarks about this section, Section 61.06. Now the jury is asking for something which is specifically answered by this section. It is designed for the jury's question. It is inappropriate to give 24C because 24C answers an altogether different question in a way which could be most confusing to this jury, because of the preliminary sentence which is the language of the prosecution. That preliminary sentence is not in the Tonio Case. I have the Tonio case which is a Tenth Circuit decision and I have a xeroxed

copy of United States versus Sellers, which quotes with approval the language of Tonio. Both of these cases do not have a sentence, "A bookmaker is just one example of a person who is engaged in the business of betting or wagering."

THE COURT: Tonio does say on page 447, "The statute deals with bookmakers, persons engaged in the business of taking or wagering." Bookies take bets, they receive them, they handle them --" et cetera.

That is essentially 24C.

MR. NASTASI: I beg the Court's indulgence for a moment further. It is not essentially 24C. By making the class of interest greater than bookmakers, you are answering the question in such a way as to say, I am going to define for you a class of things which is labeled "A", of which "C" is a subpart. The Government reverses that and says, We are talking about a class "C", of which "A" is a subpart.

They jury does not want to know what the business of betting and wagering is. The jury wants to know what bookmaking is and to answer it any way other than that is to argue the Government theory of the case. It is argument by the Government and it nowhere appears in a decided case that a bookmaker is one example of a person who is engaged in the business of betting and wagering.

THE COURT: I am reluctant to read to the jury 61.06(a) from Devitt and Blackmar, which is based on Fifth Circuit pattern instructions No. 36, because it injects into the case some new concepts that really were not in the case. I think there are two ways this problem can be handled. One is I can read what a bookmaker is from what I have in the charge and this is based on Tonio, which is the case just cited by Mr. Nastasi. I can say to the jury, you will recall that I said to you in my charge that bookmakers take bets, they receive them and they handle them or service these bets. Bookmakers have customers. They distribute line information and they lay off bets.

I can say to the jury, I did not define in my charge the meaning of the word "bettor". I would ask the jury to apply its common sense to determine what a bettor is and let it go at that.

I think the alternative is to read everything in my charge in respect to Count 2 and Count 3, which would be a very safe thing to do.

MR. SIMONE: Your Honor, I agree with you up to the last point and I don't think there is any disagreement. I think, yhou can say that a bettor is one who places a bet, period, rather than for them to use their common sense.

MR. CLARK: The Government prefers to the approach that you stated, that they should use their common sense and the Government thinks

the entire request Point 24C should be given.

The note from the jury indicates they want a repetition of the definition in context which they already received. This case is about the business of betting and wagering and we think the entire request No. 24C should be read, sir.

MR. NASTASI: If the Court pleases, I don't know how it is that Mr. Clark can read the minds of deliberating jurors.

Your Honor, that is pure speculation. The jury has said what it wants and we should go by the plain meaning of its request. If we have to use statutory construction on such a simple request, it hardly seems necessary. If the Court pleases, I want to join in what Mr. Simone said and say this: What a bettor is, is not so simple a matter that it should be left to their common understanding, because when I had Mr. Holmes on the stand and I asked him what gambling was, his definition differed from that that I asked him about, and that which I asked him about was from Webster's Dictionary, and he being an expert in the field not knowing what Webster's had to say about it, agreed with me after I read it to him. I think the jury should be told a bettor is someone who places a wager on the outcome of an uncertain event, and his profits depend upon chance.

In the alternative, I ask that you read again what you already told the jury because it may well

be that they want a repetition of your definition.

THE COURT: All right. Just a moment.

Would the Government object if I would say exactly what I said a moment ago, or would anybody object for that matter?

I know Mr. Simone and Mr. Nastasi will not agree with this, but I will repeat what I said a moment ago. I would read the sentence starting with, "Bookmakers take bets," et cetera, tell the jury I didn't define the word "bettor", they should use their common sense, and say to them that a bettor is simply a person who places a bet and let it go at that.

MR. SIMONE: I would accept that, Your Honor.

MR. CLARK: Your Honor, we would accept that, but we would also ask that the beginning portion of 24C also be read.

THE COURT: You mean, "A bookmaker, Members of the Jury, is but just one example of a person who engages in the business of betting or wagering"?

MR. SIMONE: They are not asking for that. I would object to that.

MR. CLARK: That is what the whole context of the case is all about.

MR. NASTASI: that is the Government's argument. That is the ultimate issue in the case, and it is not what the jury is asking. It restates

the Government's argument as part of the definition they have requested.

THE COURT: You are telling me the jury is about to engage in an oversimplification; is that in essence what you are saying?

MR. CLARK: Yes.

THE COURT: All right, gentlemen, I sense the jury here might be adopting a simplistic approach. This is the thing that concerns me. Just a moment, gentlemen.

All right, gentlemen, I think, notwithstanding my comment of a moment ago, it is my plan now to read the one sentence, "Bookmakers take bets," et cetera, and tell the jury to apply their common sense as to the meaning of the word "bettor", and tell them one common sense definition of "bettor" would be a person who simply places a bet.

I can say to the jury if you feel you need more detailed instructions, I would be happy to reread my charge in respect to Count 2 and 3, and give you all of that information, if you feel you need it, and the jury can tell me whether they feel they need it.

I take it, now, Mr. Nastasi and Mr. Simone, you are satisfied with this approach. Mr. Clark is satisfied, except you want me to add the first sentence of 24C; is that what it boils down to?

MR. CLARK: Yes.

THE COURT: I will not read the first sentence of 24C.

Are we ready for the jury?

MR. SIMONE: Yes.

MR. NASTASI: Yes.

MR. CLARK: Yes.

THE COURT: Would the jury be brought in, please?

(Whereupon, at 2:43 p.m., the jury entered the courtroom and the following transpired in open court, in the presence and hearing of the jury:)

THE COURT: Members of the jury, I regret that we have had a delay between receiving your note and answering the note, and I believe you were told to continue your deliberations and meanwhile you had lunch brought in.

I did wish to consult in detail with the lawyers in respect to the second note which I have received from the jury and this note reads:

"May we please have the definition of a bookmaker and a bettor?"

And in reply to that note, may I tell you that you will recall from my charge that I told you that bookmakers take bets, they receive them, and they handle or service these bets. Bookmakers have customers, they distribute line information and lay off bets."

I would ask that you use your ordinary common sense to determine the meaning of the word "bettor".

I might say that one common sense definition of the meaning of the word is simply that a bettor is a person who places a bet.

Now, may I also say this to you, members of the jury, and I am anxious to be helpful to you. If you want to obtain a more complete picture and perhaps have what might be called a fuller discussion, I could reread to you my charge in which I tell you about Count 2 and Count 3, and explain the essential elements and read the acts involved. This would give you a complete picture. You may not want that. Not all of you unanimously have to request that I reread part of my charge from Counts 2 and 3. This would give you a complete picture.

If anyone wants that or some of you want it, all of you need not request it, I would be willing to do that, that might take perhaps ten or fifteen minutes. It would give you a more complete picture.

I would suggest what you do is continue your deliberations. If one or more of you want me to reread all of what I told you with respect to Counts 2 and 3, I would be glad to do that.

Any comment from counsel at sidebar?

MR. SIMONE: No, Your Honor.

MR. NASTASI: None, Your Honor.

MR. CLARK: None from the Government.

THE COURT: I ask that you continue your deliberations.

(Whereupon, at 2:54 p.m., the jury left the courtroom to continue their deliberations, after which the following transpired in open court outside the presence and hearing of the jury:)